



July 25, 2008

**BY FEDERAL EXPRESS**

The Honorable John Paul Woodley, Jr.  
Assistant Secretary of the Army, Civil Works  
108 Army Pentagon, Room 3E446  
Washington, D.C. 20310

**Re: Determination of Two Reaches of the Santa Cruz River as  
Traditional Navigable Waters**

Dear Assistant Secretary Woodley:

On May 23, 2008, Colonel Thomas H. Magness, United States Army, acting as the Commander of the Los Angeles District of the Army Corps of Engineers ("the Corps"), issued a written determination that two reaches of the Santa Cruz River in southern Arizona are traditional navigable waters ("TNW") pursuant to 33 C.F.R. § 328.3. We understand that Corps Headquarters is reviewing that determination. The purpose of this letter is to provide you with comments regarding Colonel Magness' determination (hereinafter called the "TNW Determination") which, in our view, has no factual basis and is legally unsupportable.

**1. Background on the Associations.**

As a preliminary matter, the National Association of Home Builders ("NAHB") is a national trade association consisting of more than 235,000 builder and associate members organized into approximately 850 affiliated state and local associations in all 50 states, the District of Columbia and Puerto Rico. NAHB's members include individual and firms that construct single-family homes, apartments, condominiums, and commercial and industrial projects, as well as land developers and remodelers. NAHB has been closely involved in a number of Clean Water Act regulatory issues, including issues arising under the Section 404 permit program administered by the Corps.

The Home Builders Association of Central Arizona ("HBACA") and the Southern Arizona Home Builders Association ("SAHBA") are affiliates of NAHB. HBACA was formed in 1951 to provide a unified voice on issues affecting the housing and building industry in central Arizona, including Maricopa and Pinal Counties, and currently has approximately 850 members. SAHBA was similarly formed in 1953 to provide a vehicle for businesses in the housing and building trades industries in southern Arizona (including Pima County) to address issues relating to those industries. SAHBA presently has approximately 700 members.

All three Associations represent their members in legal, regulatory and legislative matters affecting the use and development of their land, including matters arising under the Clean Water Act. For the reasons set forth below, we are very concerned about the basis for the TNW determination, and the precedent that this determination may establish in the arid Southwest, given the historic and current condition of the Santa Cruz River.

## **2. The TNW Determination.**

As previously stated, Colonel Magness has determined that two reaches of the Santa Cruz River, which is located in southern Arizona, are TNWs. One reach determined to be navigable is called "Study Reach A" and begins at the U.S. Geological Survey ("USGS") gage station near Tubac, Arizona, and ends at the USGS gauge station near Continental, Arizona, a distance of approximately 20 miles. By most historical accounts, the Santa Cruz River was ephemeral or intermittent in this area with very limited and irregular surface flows. The Arizona Department of Environmental Quality ("ADEQ") has classified Study Reach A as an ephemeral water for water quality and related purposes. A.A.C. R18-11-101(27) & App. B. At present, base flow in the lower portion of Study Reach A is regulated by the discharge of sewage effluent from the Nogales International Wastewater Treatment Plant, while the upper portion of this reach is dry most of the year.

The other reach determined to be navigable is called "Study Reach B" and begins at the outfall of Pima County's Roger Road wastewater treatment plant in northwestern Tucson, Arizona, and ends at the Pima County-Pinal County border, a distance of approximately 30 miles. Historically, this reach was ephemeral and presently has no natural flow for most of the year. Its base flow is sewage effluent that is discharged from Pima County wastewater treatment plants in northwest Tucson. ADEQ has classified Study Reach B as an "effluent-dependant water" for water quality and related purposes. A.A.C. R18-11-113(D)(7).

## **3. The Legal Test for Navigability.**

As an initial matter, the Associations want to make clear our position that the jurisdiction of the Clean Water Act ("CWA") covers more than just TNWs. In *Rapanos v. United States*, 547 U.S. 715 (2006), both Justice Scalia (writing for the four-Justice plurality) and Justice Kennedy (concurring in the judgment) agreed that the CWA's scope extends beyond TNWs. *See id.* at 731 (Justice Scalia: "[T]he Act's term 'navigable waters' includes something more than traditional navigable waters ...."); *id.* at 779 (Justice Kennedy: "...[T]he Act contemplates regulation of certain 'navigable waters' that are not in fact navigable"). However, the determination of whether an aquatic feature is a TNW is the crucial, foundational component of each of their CWA analyses. Justice Scalia wrote that one "finding" necessary to determine if a wetland is covered by the CWA is if the "adjacent channel contains a 'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water connected to *traditional interstate navigable waters*) ...." *Id.* at 742 (emphasis added). Justice Kennedy stated that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in

question and *navigable waters in the traditional sense.*” *Id.* at 779 (emphasis added) (Kennedy, J., concurring). Thus, while the CWA’s purview is not coterminous with TNWs, waters deemed navigable in the traditional sense remain critical to determine the reach of Corps and EPA authority.

The determination of what Arizona rivers qualify as TNWs should be a simple, straightforward inquiry of what has been previously regulated by the Corps under the Rivers and Harbors Act (“RHA”), 33 U.S.C. §§ 403, 407. The Colorado River is the only water body in Arizona that qualifies.<sup>1</sup> Previously, the Corps concluded that the Gila River was non-navigable from Painted Rock dam to the Colorado River. If that reach of the Gila River is not navigable, then federal regulatory authority under the RHA could not extend to upstream reaches of the Gila River or any of its tributaries since RHA jurisdiction requires a continuous water-borne connection.<sup>2</sup> Therefore, the Colorado River represents the only watercourse “traditionally” regulated in Arizona.

The Corps’ regulatory definition of the term “waters of the United States,” found in 33 C.F.R. Part 328, does not alter the scope of federal jurisdiction. The test for traditional federal regulatory authority over “navigable waters of the United States” was set forth in *The Daniel Ball*, 77 U.S. 557, 563 (1870), which explained:

The test by which to determine the navigability of our rivers is found in their navigable capacity. Those rivers are public navigable rivers in law which are navigable in fact. Rivers are navigable in fact when they are used, or susceptible of being used in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

Under this test, a water body must be used, or susceptible of being used, as a highway for commerce and, either by itself or in conjunction with other waters, form a continuous interstate highway for water-borne commerce.

---

<sup>1</sup> *Arizona v. California*, 283 U.S. 423 (1931). Notably, the Colorado River is the only Arizona watercourse listed on the Los Angeles District website as regulated under the RHA.

<sup>2</sup> See e.g., *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 621-22 (8th Cir. 1979).

The Corps' regulatory definition of "waters of the United States" incorporates *The Daniel Ball* test. So-called "(a)(1)" waters purport to consist of waters that were traditionally regulated based on their ability to form a continuous interstate highway for water-borne commerce. See 33 C.F.R. § 328.3(a)(1) (referring to "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide"). The Supreme Court's recent opinions in *Rapanos* similarly refer to "traditional interstate navigable waters" and to "waters susceptible to use in interstate commerce – the traditional understanding of the term 'navigable waters of the United States.'" *Rapanos v. United States*, 126 S.Ct. 2208, 2216 (citing 33 C.F.R. § 328(a)(1)) (plurality opinion), 2237 (Kennedy, J., concurring) (emphasis supplied). See also *Sierra Pacific Power Co. v. F.E.R.C.*, 681 F.2d 1134, 1138-40 (9th Cir. 1982) (holding that the Truckee River is not a navigable water of the United States because it lacks a navigable interstate linkage by water); *Puget Sound Power & Light Co. v. F.E.R.C.*, 644 F.2d 785, 789 (9th Cir. 1981) ("Navigability depends upon the stream's usefulness as a transportation mechanism for commerce").

In short, for a water body to be classified as a TNW, the water body must have been used, or be susceptible to use as a highway for water-borne interstate commerce, as opposed to being capable of floating a small boat immediately after a flood event or during peak discharges of sewage effluent.

#### **4. The Historical Evidence and Finding of Non-Navigability Made By the Arizona Navigable Stream Commission.**

Colonel Magness has apparently ignored the findings and determination that were made in 2006 by the Arizona Navigable Stream Adjudication Commission ("the Commission"), which was established by A.R.S. § 37-1101, *et seq.*, for the purpose of investigating and determining whether rivers, streams and other water bodies in Arizona were navigable for title purposes as of February 14, 1912. The Commission conducted hearings, received evidence and ultimately determined "that the Santa Cruz River was not used or susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water as of February 14, 1912." Arizona Navigable Stream Adjudication Commission, *Report, Findings And Determination Regarding The Navigability Of The Santa Cruz River From The Mexican Border To The Confluence With The Gila River* 27 (Oct. 18, 2006) ("Navigability Determination").<sup>3</sup> In addition, the Commission also determined:

- "[T]he Santa Cruz River, while considered to be a perennial stream, has an almost insignificant flow during the dry seasons of the year. As of February 14, 1912 and currently, it flows/flowed primarily in direct response to precipitation and seasonal storms."

---

<sup>3</sup> A copy of the Commission's Navigability Determination is enclosed with this letter.

- “[T]here is no evidence of any historical or modern commercial boating having occurred on the Santa Cruz River.”
- “[T]here is no evidence of any commercial fishing having occurred on the Santa Cruz River.”

*Id.* at 28. The Navigability Determination discusses a considerable amount of evidence, including written documents, studies, newspapers and other historical accounts, concerning pre-historic, historic and current conditions in the Santa Cruz River valley in support of its findings and determinations, which will not be repeated in this letter. *Id.* at 17-26. The Commission summarized this evidence as follows:

Although the Santa Cruz River has never within history or known prehistory been considered a navigable river, additional requirements for water from mining activities, agriculture and general requirements due to increased population diminished the amount of water available in the riverbed by a significant amount by 1912. As of the date of statehood, while there was some flow in the upper reaches of the Santa Cruz River, *i.e.*, in Santa Cruz County, the remainder of the river would have to be considered ephemeral or intermittent at best. The lower reach of the river from Marana north to the confluence with the Gila River has always been dry, flowing only in response to significant precipitation. The Santa Cruz valley has served as an overland trade route from prehistoric times, but there is no documented record of any trade or travel on the river during the period leading up to statehood. Travel in or near the Santa Cruz River was accomplished by horseback, wagon, pack mule, trains and later automobiles as the road system improved.

*Id.* at 25.

Other historians and commentators have provided similar descriptions of the Santa Cruz River. For example, in a recent study of major river systems in the southwestern United States, which was sponsored in part by the USGS, the authors summarized the Santa Cruz River as follows:

[T]he Santa Cruz was a discontinuous ephemeral stream in the 1800s with effluent-influent reaches that supported dense woody vegetation. With the exception of periods of flooding, there is no evidence that the Santa Cruz River had continuous flow from its headwaters to its terminus at the Gila River. Instead, local reaches of perennial flow punctuated an otherwise ephemeral stream.

Robert H. Webb, Stanley A. Leake and Raymond M. Turner, *The Ribbon of Green: Change in Riparian Vegetation in the Southwestern United States* 254 (Univ. of Arizona 2007).

An historian who has served as an expert witness for the Arizona Attorney General's Office and the City of Tucson on water-related issues has stated, in a report prepared on the upper Santa Cruz River (which includes Study Reach A):

Virtually no evidence exists to suggest the river was at any time navigable. Indeed, the river's most recent biographer, Michael Logan, entitled his eloquent and scholarly volume published in 2002, *The Lessening Stream: An Environmental History Of The Santa Cruz River*. It never mentions navigation. This persuasive interdisciplinary synthesis, supported by sound primary research, skillfully weaves history with geology, archaeology, and anthropology and concludes that the history of the upper Santa Cruz River centered on irrigation and agriculture, not navigation or commerce. Similarly, Tellman and Yarde dutifully attempt to report navigation possibilities in their account. However, compelling primary source information that suggests the Santa Cruz River as a navigable stream does not exist. Put another way, the long and tempestuous history of conflicts over a chronically intermittent stream and the high premium given to its irrigation capabilities – the great demands placed on the documented limits of the surface water – further indicates that navigational use was highly unlikely. The preponderance of scientific evidence ... attests to the fact that surface flows at [the time of statehood] were virtually non-existent. The waters of the Santa Cruz River fueled the basin's economy but they were not used for their navigability and transportation value. Instead, this "lessening stream's" intermittent supply served agricultural and domestic needs.

Jack L. August, Jr., *The Upper Santa Cruz River: History Of A Lessening Stream* 14-15 (March 2003) (citing Michael F. Logan, *The Lessening Stream: An Environmental History Of The Santa Cruz River* (University of Arizona Press 2002), and Barbara Tellman and Richard Yarde, *A Historical Study Of The Santa Cruz River: Background Information For Determination of Navigability Of The River At The Time Of Statehood, 1912* (Water Resources Research Center, University of Arizona 1996)).

Colonel Magness, unfortunately, ignored these publications and reports, as well as the Commission's Navigability Determination, and instead provided facts that are incorrect, misleading or simply irrelevant to determining whether the two study reaches have been used, or may be susceptible to use, as highways of interstate commerce.

For example, Colonel Magness notes that earthen dams were constructed on the river in the mid-1800s. TNW Determination at 1-2. The small lakes formed by these dams were used for milling, hunting waterfowl, aquaculture and other purposes until the 1880s. *Id.* First, the location of these improvements is *not* within either study reach. Instead, they were near present-day Silverlake Road, which is in South Tucson. Study Reach A ends about 30 miles south of this location, while Study Reach B begins about 8 miles north of this location.

Second, the reach of the Santa Cruz River from Martinez Hill, located west of the Tucson International Airport, to Sentinel Peak, near present-day Congress Street, was apparently perennial until the early twentieth century, at which time the City of Tucson's development of infiltration galleries and shallow wells for municipal water supplies dried up that reach of the river. *See Webb, supra*, at 258-59. A photo of the Santa Cruz River in this area is attached to the TNW Determination as Exhibit B.<sup>4</sup> As the picture shows, however, this area was covered with grasses and mesquite groves, and was described as "swampy." *Id.* at 255.

Third, the reference to the river being "wide and deep enough to float a 'mammoth steamboat' (TNW Determination at 2) appears to refer to exaggerations made by a real estate speculator in the late 1800s:

Back at the end of the nineteenth century, an enterprising land speculator promoted sales of property at Calabasas (now Rio Rico, north of Nogales) with brochures showing ocean-going steamships moored at a busy Santa Cruz River wharf. ... The story persisted for years that steamships had plied the river. Anyone who came to see the busy wharf was destined to be disappointed in the shallow marshy creek, unable to support even small boats except in flood season.

Barbara Tellman, Richard Yarde and Mary G. Wells, *Arizona's Changing Rivers: How People Have Affected the Rivers* 3 (Water Resources Center, Univ. of Ariz. March 1997).

The reality is that, as the foregoing authorities demonstrate, Colonel Magness' statement that "[u]ntil the late nineteenth century, the Santa Cruz River was primarily a perennial watercourse that served the region's agricultural needs until a quickly developing industrial society began to tap the river subsurface flow" (TNW Determination at 1), is simply not accurate. In fact, much of the river was historically ephemeral or, at best, intermittent, including the two study reaches the Corps has declared to be TNWs. There is no evidence that either study

---

<sup>4</sup> The same photo is also reproduced in Webb, at page 268, which describes the photo as showing a downstream view of the river in 1904, looking northeast from the slope of Sentinel Peak. It is surprising that the only historic photo appended to the TNW Determination is not from either study reach, but instead shows another portion of the river. At a minimum, this fact should have been clearly noted to avoid confusion.

reach was used, or was susceptible to being used, for any form of interstate water-borne commerce, as the Commission determined in 2006.

**5. The Corps' TNW Determination Is Unsupported By Any Legitimate Evidence.**

**a. The Ordinary Condition of the Santa Cruz River.**

Colonel Magness contends that the two study reaches possess "physical characteristics" indicating that they have the capacity and susceptibility to be navigated by recreational water craft. TNW Determination at 2. As a preliminary matter, a water body's susceptibility to use for recreational purposes is insufficient by itself to support a finding that the water body is a TNW, *i.e.*, susceptible to being used as a highway for interstate commerce. *See, e.g., Alaska v. Ahtu, Inc.*, 891 F.2d 1401, 1404-05 (9th Cir. 1989) (holding that evidence of substantial commercial use by recreational watercraft industry that employs some 400 persons supported finding of river's navigability at statehood). *Puget Sound Power*, 644 F.2d at 788 ("The 'personal or private use by boats' may demonstrate 'the availability of the stream for the simpler types of commercial navigation.'") (quoting *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 416 (1940)). Putting aside that legal error, the discussion that follows on pages 2 through 4 of the TNW Determination is incomplete and misleading.

Colonel Magness reviewed flow data published by the USGS for stream gages located near Tubac, Amado and Continental evaluating the Study Reach A, and gages near Cortaro Road and Trico Road in evaluating Study Reach B. Colonel Magness discussed the *mean* and *average* flow rates at these gage stations. The problem with this approach is that it fails to properly take into account flood flows that result from localized storm events, which do not represent the ordinary or normal base flow in the river. As the Supreme Court has explained:

In the case of the Rio Grande in New Mexico, the Court said ... :  
"Its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water. The ordinary flow of water is insufficient. It is not like the Fox River, which was considered in *The Montello*, in which was an abundant flow of water and a general capacity for navigation along its entire length, and although it was obstructed at certain places by rapids and rocks, yet these difficulties could be overcome by canals and locks, and when so overcome would leave the stream, in its ordinary condition, susceptible of use for general navigational purposes." ... [T]he Court, describing the Red River in the western part of Oklahoma, said that "Only for short intervals, when the rain-fall is running off, are the volume and depth of the water such that even very small boats could be operated therein. ... The rises usually last from one to seven days and in the aggregate seldom cover as much as forty days in the year;" and, in relation to

the eastern part of the river, it was found ... that "Its characteristics are such that its use for transportation has been and must be exceptional, and confined the irregular and short periods of temporary high water." In [a third case] the Court accepted the findings of the two courts below as to the non-navigability of the Arkansas River above the mouth of the Grand River in Oklahoma, and the District Court, to whose findings the Circuit Court of Appeals referred, had said that "The use of that portion of the river for transportation boats has been exceptional and necessarily on high water, was found impractical and abandoned. The rafting of logs or freight has been attended with difficulties precluding utility. There is no practical susceptibility to use as a highway of trade or travel."

*United States v. Utah*, 283 U.S. 64, 87-88, n.12 (1931) (quoting *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699 (1899); *Oklahoma v. Texas*, 258 U.S. 574, 587 (1922); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86 (1922). (citations omitted)<sup>5</sup> See also *North Dakota v. United States*, 972 F.2d 235, 239 (8th Cir. 1992) (an isolated commercial venture that is partially successful because of unusually high water is not evidence of navigability); *Puget Sound Power*, 644 F.2d at 787 ("If the waterway is merely capable of exceptional transportation during periods of high water, it is not navigable.").

Here, it is apparent from the face of the TNW Determination that the Santa Cruz River's normal flow is substantially less than the peak flow. For example, while the mean monthly discharge at the Continental gage station since 1940 has varied from 0.43 cfs to 76 cfs, the maximum peak flow at that same station was approximately 45,000 cfs in the early 1980s, and the minimum peak flow has exceeded 1,000 cfs 63 times (approximately once each year) since 1940. TNW Determination at 3. The data presented in the TNW Determination show a similar pattern for the other gage stations. In order to determine the ordinary or normal flow rate, therefore, Colonel Magness should have eliminated peak (i.e., flood) flows by, for example, calculating the mean or average flow rate without considering the 25 highest daily mean flows to exclude periods of temporary flooding.

Instead, peak flows apparently are discussed in the TNW Determination to show that for a few weeks each year (or less) the Santa Cruz actually carries more than a few cubic feet per second of water. Compare, e.g., *Athna*, 891 F.2d at 1402 (stating that the normal flow in the river at issue varies from 3,600 to 4,800 cfs from May through September). The issue, again, is

---

<sup>5</sup> In *United States v. Utah*, by contrast, the special master had determined that portions of the Colorado River specifically determined that the river's "susceptibility of use as a highway for commerce was not confined to exceptional conditions or for short periods of temporary high water, but that during at least nine months of each year the river ordinarily was susceptible of such use ... ." *Id.* at 87.

the “ordinary condition” of the Santa Cruz River, not its peak flows during flood events, as the courts have repeatedly stated.

Even more troubling is the failure of Colonel Magness to acknowledge the role that sewage effluent plays in maintaining minimum flows in both study reaches. The base flow in Study Reach A is regulated by the Nogales International Wastewater Treatment Plant (“NIWTP”), which is located near Rio Rico, Arizona, approximately 10 miles south (upstream) of the Tubac gage station. The NIWTP discharges between 8.8 mgd and 16.0 mgd of sewage effluent into the Santa Cruz River every month. According to the Environmental Protection Agency “[t]he volume of effluent discharged from the NIWTP is directly but not completely correlated with the length of the above ground portions of the Santa Cruz River. This length, depending on season and year, currently averages about 26 km (16 miles).” *Environmental Assessment for Nogales International Wastewater Treatment Plant (NIWTP) Upgrade/Expansion*, 1-36 (Region IX, U.S.E.P.A.).<sup>6</sup> See also *id.* at 1-17 (“it is clear, however, that during the vast majority of the time, the primary contributor to surface flow downstream of the NIWTP is the volume of effluent discharged to the Santa Cruz River”). Similarly, the USGS has stated that base flow at the Tubac gage station “is regulated by [the] sewage treatment plant at Rio Rico. *No natural flow for most of each year.*” USGS, *Water Resources Data Arizona: Water Year 1999, Water-Data Report AZ-99-1*, 179 (2000) (emphasis supplied).

Study Reach B is likewise dominated by sewage effluent. Pima County operates and maintains two metropolitan area wastewater treatment facilities, which are located near the Santa Cruz River at Roger Road and Ina Road. In fact, the southern (upstream) limit of Study Reach B is the Roger Road sewer plant’s outfall. TNW Determination at 1. The combined treatment capacity of those facilities is 78.5 mgd, and they collectively discharged over 52,000 acre-feet of effluent directly into the river in 2007. Pima County Regional Wastewater Reclamation Department, *2007 Effluent Generation Report* 3.<sup>7</sup> As a consequence, virtually all of the flows recorded in Study Reach B are the result of the discharge of sewage effluent into the river. For example, the USGS has stated that most of the base flow at the Trico Road gage station, located in the northern (downstream) portion of Study Reach B, consists of effluent discharged from the Ina Road sewer plant, which is located 17.6 miles upstream. USGS, *Water Resources Data* at 191.

Remarkably, the TNW Determination fails to squarely address the fact that the “ordinary” flow in both study reaches consists primarily (if not completely) of sewage effluent. Instead, the TNW Determination cryptically notes, for example, that ADEQ “has adopted water

---

<sup>6</sup> This environmental assessment and other background information on the NIWTP’s operations are available at <http://www.epa.gov/usmexicoborder/infrastructure/nogales/waste.html> (last visited July 23, 2008).

<sup>7</sup> This report is available at [http://www.pima.gov/www/reports/index\\_reports.htm#effluent](http://www.pima.gov/www/reports/index_reports.htm#effluent) (last visited July 23, 2008).

quality standards for the Santa Cruz River for partial body contact.” TNW Determination at 4. Full body contact is, for obvious reasons, not permitted, nor can this water be used to irrigate crops for human consumption.<sup>8</sup>

Colonel Magness disregarded both flood flows and effluent discharges to conclude that data from the Tubac, Cortaro and Trico Road gage stations indicate that “during most days” from July to October and during approximately half of the months of December and January, “there is sufficient flow in the Santa Cruz River within the Study reaches to float a canoe.” TNW Determination at 4. As explained above, to the extent there is water within the study reaches during those periods, it is the result of a combination of flood flows caused by precipitation events and the discharge of sewage effluent. Neither condition represents the ordinary or normal condition of the river.

**b. Two “Boating” Stunts Do Not Establish Navigability.**

The concluding pages of the TNW Determination contain a hodgepodge of irrelevant information, including references to two instances where the Santa Cruz River was allegedly “navigated.” TNW Determination at 5. These activities consisted of two largely unsuccessful attempts to float a small boat on the river immediately following a flood event. *Id.* at Exhibit G (“additional navigation documentation”). According to this documentation, in August 2005, a Tucson radio station intern launched a raft “in the flooded Santa Cruz River,” but managed to get out of the river before he was located by police officers. A Tucson fire department official stated that this stunt was irresponsible and unsafe. This news story highlights that during flood events, the Santa Cruz River is not susceptible to navigation but is, instead, a safety risk.

The other documentation is a news story that was published in October 1994, describing an event that apparently occurred in 1993 “after the January floods.” *Id.*<sup>9</sup> This news article, which is written in a humorous style, highlights the difficulty of boating on the Santa Cruz River, even after a significant flood event. It appears that the would-be boaters began approximately one mile south of Tubac, had their canoe immediately capsize when it slammed against a tree, but were ultimately able to travel about three miles of the river and into a portion of Study Reach A. The article mentions another, earlier attempt to “navigate” the river following a flood event

---

<sup>8</sup> ADEQ has classified the Santa Cruz River from the NIWTP outfall to Tubac Bridge and from the Roger Road wastewater treatment plant outfall to Baumgartner Road in southern Pinal County as “effluent-dependent waters.” See A.A.C. R18-11-113(D)(7). ADEQ has also classified the reach of the Santa Cruz River from the Tubac Bridge north (downstream) to the Roger Road wastewater treatment plant outfall as ephemeral, which is defined as “a surface water that has a channel that is at all times above the water table, and that flows only in direct response to precipitation.” A.A.C. R18-11-101(22) & App. B. Thus, ADEQ has classified all of Study Reach A as an ephemeral water.

<sup>9</sup> Major flooding occurred in much of Arizona during January 1993, as evidenced by Exhibit D of the TNW Determination. According to that document, a peak flow of 37,400 cfs was recorded on January 19, 1993 at the USGS gage in Tucson.

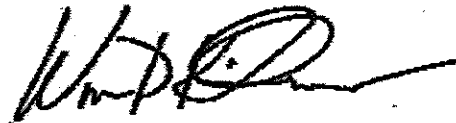
Hon. John P. Woodley, Jr.  
July 25, 2008  
Page 12

in 1914, noting that the boat failed to reach its intended destination in Tucson and was, instead, dragged out of the river and used as a watering trough for cattle.

These stunts, while amusing, do not support the TNW Determination. To the extent they are relevant, they highlight the fact that the Santa Cruz River is unsafe and cannot be navigated during periods of peak flow. The balance of the TNW Determination discusses a number of additional, unhelpful facts, such as the potential for tourists to visit the river and engage in activities such as hiking, horseback riding and birding. TNW Determination at 4, 5. Obviously, the possibility that out-of-state tourists may visit the area and hike along the river due to its easy access is irrelevant to the issue of whether the river is "susceptible of being used, in [its] ordinary condition, as [a] highway[] for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. at 563.

For these reasons, we believe that Colonel Magness' determination that Study Reaches A and B are navigable waters of the United States has no legal or factual basis. Accordingly, we ask that Corps headquarters vacate the TNW Determination. We also ask that Colonel Magness be instructed to apply the correct *Daniel Ball* test for determining whether other Arizona water bodies constitute a TNW. If you have any questions or require additional information, please contact at the National Association of Home Builders: Susan Asmus, Staff Vice President, Environmental Policy ([sasmus@nahb.com](mailto:sasmus@nahb.com), (800-368-5242 x8538); or Duane Desiderio, Staff Vice President, Legal Affairs ([ddesiderio@nahb.com](mailto:ddesiderio@nahb.com), (800) 368-5242 x8146).

Sincerely,



William P. Killmer  
Group Executive Vice President, Advocacy  
National Association of Home Builders



Connie  
President and Executive Director  
Home Builders Association of Central Arizona



Edward P. Taczanowski  
President  
Southern Arizona Home Builders Association

Hon. John P. Woodley, Jr.  
July 25, 2008  
Page 13

Enclosures: Report, Findings and Determination of Arizona Navigable Stream Adjudication  
Commission, Regarding Santa Cruz River, October 18, 2006

c: Colonel Thomas H. Magness, Commander, Corps Los Angeles District (by Federal Express)

2088538.1

